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No. 96-1965

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THERESA MARTIN,

Petitioner,

vs.

SHAW'S SUPERMARKETS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner Theresa Martin ("Martin"), pursuant to Supreme Court Rule 15.6, respectfully submits this brief Reply to the Brief In Opposition of Respondent Shaw's Supermarkets, Inc. ("Shaw's" or "the Company") to Martin's Petition for a Writ of *Certiorari*.[1] Martin addresses three points raised by the Respondent: (1) the First Circuit's reading of the provisos in Massachusetts' workers' compensation law to change the character of the state rights granted, so as to require pre-emption,[2] does not resolve the asserted conflicts with decisions of this Court and other circuits, it creates them; (2) the decision below misstates the law of Section 301 pre-emption; and (3) even construing the First Circuit's decision to misapply "a properly stated rule of law," Supreme Court Rule 10, Opposition at 8, *certiorari* is warranted where, as here, misapplication of Section 301 preemption denies enforceability to Massachusetts' balancing of substantive employment standards[3] with workers' rights of self-determination, and could be applied to nullify other states' similar exercise of their police powers.

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1. Martin shall refer herein to Respondent's Brief in Opposition as "Opposition," followed by the appropriate page citation; to her Petition For Writ of Certiorari as "Petition," and to the Appendix as "App."

2. In its opinion, the First Circuit states, "It is very doubtful whether, without this last-quoted proviso, Shaw's would have any plausible claims of federal preemption. Massachusetts has an independent interest in regulating injury compensation; and apart from the proviso, the elements of both Martin's state-law claims appear to be independent of bargaining agreement provisions." App. 6a.

3. Mass. Gen. L. ch. 152, § 75A ("Section 75A") grants a previously work-injured individual preference in hiring over other non-employees of the former employer. App. 122a. Mass. Gen. L. ch. 152, § 75B ("Section 75B") prohibits an employer from discriminating against an employee because of the exercise of rights under the workers compensation statute. App. 123a-124a.

FURTHER REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE CIRCUITS OVER THE REACH OF SECTION 301 PREEMPTION.

This case presents, in the words of the First Circuit, "a difficult preemption issue . . . ," App. 2a, and warrants grant of a Writ of *Certiorari* because of the compelling need to resolve enduring conflicts concerning important questions of federalism: *i.e.* the reach of Section 301 pre-emption where a state, in the exercise of its police powers, attempts "to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." *Fort Halifax v. Coyne*, 482 U.S. 1, 22 (1987). *See also* Supreme Court Rule 10(a). Here, the linchpin of the First Circuit's decision, and of Shaw's Opposition to this Petition for *Certiorari*, is the paradoxical assertion that, contrary to the legislature's apparent intent, Massachusetts "has . . . chosen to make the substantive rights conferred by the statutes depend upon their not being 'inconsistent' with a labor agreement." App. 7a. *See also* App. 9a (the "proviso . . . may be producing some results that the legislature did not intend"). Based on the premise that an element of the state right is the absence of an inconsistency with a labor agreement, the First Circuit thus concludes that Martin's claims for non-retaliation and for preference in hiring over other non-employees of Shaw's are preempted by the presence of a collective bargaining agreement that does not cover her, "not because the collective bargaining agreement *is* inconsistent with the state claims asserted, but because it *may* be so and requires interpretation." App. 8a-9a. Far from resolving conflicts between its decision and those of other circuits, and of this Court, the First Circuit's strained reasoning creates and perpetuates the conflicts.

Setting aside, for purposes of this Reply, cases in other circuits that arise from non-statutory state law claims[4], there is no avoiding

4. It lies beyond the bounds of this Reply to rebut point by point Shaw's attempts to distinguish the conflicting cases cited from the Second, Fourth, and Fifth Circuits. Supreme Court Rule 15. *See* Petition at 12-13, 21-24.

the conflict between the First Circuit's decision and that of the Seventh Circuit in *Kohl's Food Stores v. State of Wisconsin and Hyland*, 32 F.3d 1075 (7th Cir. 1994) (hereinafter, "*Kohl's*"), because applying the First Circuit's reasoning to the statutory language in *Kohl's* would compel a result opposite to that reached by the Seventh Circuit. *Kohl's*, 32 F.3d at 1078-1079 (holding no pre-emption). In *Martin*, the First Circuit read the Massachusetts proviso to condition the substantive rights conferred "upon their not being 'inconsistent' with a labor agreement," and imported as an element of plaintiff's case a showing based inexorably on contract interpretation. App. 7a. In *Kohl's*, Wisconsin's workers compensation statute required rehiring of a previously work-injured employee "where suitable employment is available" and where "in determining the availability of suitable employment . . . any collective bargaining agreement with respect to seniority shall govern." *Kohl's*, 32 F.3d at 1077, *quoting*, Wis. Stats. § 102.35 (3). Applied to the facts of *Kohl's*, the First Circuit's rationale would construe Wisconsin to have intended its right to rehire, as in *Martin*, to "depend upon" there being no overriding collective bargaining agreement concerning seniority — that is, in the First Circuit's view, to be negotiable — and thus to require pre-emption. But such was not the conclusion of the Seventh Circuit, *Kohl's*, 32 F.3d at 1078-1079, and *Certiorari* is warranted to resolve this conflict on the important question of the reach of Section 301 pre-emption where states grant employment protections that reference and/or defer to terms contained in collective bargaining agreements.[5]

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5. In the *Loewen Group* case cited by Petitioner, Petition at 13, 21-22, a decision subsequent to that in *Kohl's*, the Seventh Circuit expressly rejected the contention that pre-emption must follow where examination of a collective bargaining agreement is necessary to determine whether there is any inconsistency with an asserted state law right. *Loewen Group International, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (1995); *citing Allis-Chalmers v. Lueck*, 471 U.S. 202, 211; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394; *Livadas* 512 U.S. 107, 124, n.18. The Seventh Circuit emphasized,

> . . . more to the point here, merely examining the collective bargaining agreement to determine whether a

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It begs the question to deny conflict exists between the two circuits because the Seventh Circuit hinged its result on the "intent of the Wisconsin legislature . . . to make its substantive terms nonnegotiable." Opposition at 7. Indeed the First Circuit concedes the intent of the Massachusetts legislature may well have been the same. App. 9a. The statutes' respective language equally suggests the Massachusetts legislature, like the Wisconsin legislature, enacted a statute imposing "a rule of entitlement on all employers within its jurisdiction . . . ," *Kohl's Food Stores*, 32 F.3d at 1079, that provided also for employer defenses based on collectively bargained contractual obligations. Overlooked by the First Circuit, in fact the Massachusetts legislature did express its intent that the proviso to Section 75B state a waiver defense rather than "condition" the granting of the statutory right: The final subsection of the anti-discrimination provision, Section 75B(3) reads, "In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail. An employee *may not otherwise waive rights granted* by this section." Mass. Gen. L. ch. 152, § 75B(3) (emphasis added).[6] The Legislature's use of the phrases "otherwise waive" and "rights granted" belies the First Circuit's insistence on viewing the statutory right as "depending on the absence of an inconsistency," and thus "dependent" on contract interpretation for purposes of Section 301 pre-emption. *Cf. contra*, *Livadas*, 512 U.S. at 125 (contractual

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> conflict *actually* exists is not "interpreting" the collective bargaining agreement for § 301 preemption purposes. [Citation omitted].

Loewen Group International, 65 F.3d at 1423 (emphasis added).

6. The Massachusetts provisos serve also to clarify the relationship between rights granted in G. L. c. 152 and those derived from public employees' collective bargaining agreements (*see*, Mass. Gen. L. ch. 150E), and from state civil service law, Mass. Gen. L. ch. 31. *See, e.g.*, Mass. Gen. L. ch. 152, § 75A ("In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement or chapter thirty-one, the collective bargaining agreement or said chapter thirty-one shall prevail.")

waiver of state granted rights must be "clear and unmistakable," especially where state law otherwise prohibits waiver), *citing Lingle*, 486 U.S. 399, 409-410, n.9, *quoting Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

II. THE FIRST CIRCUIT'S DECISION DOES NOT "MISAPPLY A PROPERLY STATED RULE OF LAW," IT MISAPPREHENDS SECTION 301 PRE-EMPTION, THREATENS STATES' EXERCISE OF POWERS TO PROTECT THEIR CITIZENS, AND THREATENS THE DOCKETS OF THE FEDERAL JUDICIARY WITH INNUMERABLE WORKERS COMPENSATION CASES REMOVED FROM STATE COURTS.

The First Circuit does not misapply a properly stated rule of law when it holds § 301 pre-emption to apply simply because there is a "question . . . whether Shaw's labor agreement *is colorably inconsistent* with Martin's state-law claims." App. 7a (emphasis added). *See also Magerer v. John Sexton & Co.*, 912 F.2d 525, 530 (1st Cir. 1990) ("The collective bargaining agreement at issue here contains several provisions *that could be construed to govern* the conduct underlying plaintiff's . . . claim") (emphasis added). Nor is the First Circuit correct to usurp jurisdiction and extinguish Martin's state law claims,

> . . . not because the collective bargaining agreement *is* inconsistent with the state claims asserted, but because it *may* be so and requires interpretation. We could ourselves remove the doubt by interpreting the agreement one way or the other, but *this course has been foreclosed* in deference to the arbitration clause.

App. 9a (final emphasis added).

Rather, the First Circuit resists this Court's warnings not to

apply Section 301 pre-emption overbroadly or, as to represented workers, punitively, where states have exercised traditional police powers to protect citizens in matters of employment. *See, e.g., Livadas v. Bradshaw*, 512 U.S. 107, 124, *citing, Allis-Chalmers v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 1912, 85 L. Ed. 2d 206 (1985); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S. Ct. 1877, 1883, 100 L. Ed. 2d 410 (1988); *see also Livadas*, 512 U.S. at 124, n.18, 114 S. Ct. at 2078, n.18 ("Holding plaintiff's cause of action substantively extinguished may not, as *amicus* AFL-CIO observes, always be the only means of vindicating the arbitrator's primacy as the bargained-for contract-interpreter. [Citation omitted]"); *Livadas*, 512 U.S. at 130 ("the widespread practice in Congress and in state legislatures . . . bestowing basic employment guarantees and protections on individual employees without singling out members of labor unions (or those represented by them) for disability"). As a result, the decision below conflicts not only with decisions of other Circuits, and of this Court, but is at odds with bedrock principles of federal removal jurisdiction and Congress' intent to keep federal dockets clear of workers' compensation matters. *See Caterpillar v. Williams*, 482 U.S. 386, 398-399, 107 S. Ct. 2425, 22431-2433, 96 L. Ed. 2d 318 (1987) (even where state court must interpret collective bargaining agreement "to decide whether the state claim survives," no complete § 301 pre-emption for removal purposes); 28 U.S.C. § 1445(c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States").

To decide that the Massachusetts provisos displace the source of Martin's rights from the statute to Shaw's collective bargaining agreement, so as to require complete pre-emption, moreover, turns Section 301 pre-emption on its head in a potentially far-reaching way. The workers' compensation laws of every other state within the First Circuit contain provisos that, like Massachusetts', defer to collective bargaining agreements on subjects encompassed in the state-granted rights. Thus, with respect to granted rights of "transfer to suitable work," Maine's workers compensation law provides,

> The exercise of this authority shall not conflict with any provisions of a collective bargaining agreement. . . .

Me. Rev. Stat. Ann. tit. 39, § 66-A (1996).[7] The legislatures of New Hampshire and Rhode Island, like Massachusetts', have granted their formerly work-injured citizens the right to reinstatement to their respective positions, if available, and have further provided, identically, that such reinstatement,

> . . . shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement. . . .

N.H. Rev. Stat. Ann. § 281-A:25:a (1995); R.I. Gen. Laws § 28-33-47 (1956-1996). Under the reasoning of the decision below, and in clear conflict with the Congressional intent codified at 28 U.S.C. § 1445(c)[8], the First Circuit applies Section 301 pre-emption so as to invite a deluge of removals of actions brought under the workers' compensation laws of every state within the Circuit, that fairly threatens the continued enforceability of those states' protective measures, and threatens also the already burdened dockets of the district courts and of this Court.[9]

7. Maine also provides that parties to collective bargaining may agree, *inter alia*, to "light-duty, modified job or return-to-work programs." Me. Rev. Stat. Ann. tit. 39-A, § 110.

8. 28 U.S.C. § 1445(c) provides, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

9. Examples abound from other circuits also of state workers compensation laws that reference or defer to collective bargaining agreements on subjects such as the availability of reemployment, including light duty, to those protected by the state laws. *See, e.g.*, Conn. Gen. Stat. § 31-313 (providing for reassignment of injured workers to "other suitable full-time work in the employer's (Cont'd)

Nor is the First Circuit's decision, as Shaw's asserts, narrowly limited by an "unusually sophisticated and detailed [collective bargaining] agreement." Opposition at 10. The First Circuit's analysis requires § 301 pre-emption of claims asserted under §§ 75A and 75B whenever a "labor agreement is colorably inconsistent with . . . [the] state-law claims," App. 7a, and in this case finds a "management rights" provision to suffice. *Id.* However, management rights provisions are, in fact, commonplace in collective bargaining agreements; at least eighty percent (80%) of all labor agreements contain such provisions and at least seventy-four percent (74%) of all agreements utilize the very language that appears here — *i.e.* reserve to the employer the "sole right to manage its business."[10] *See* App. 76a. The First Circuit's decision thus

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establishment, if available; *provided the exercise of this authority shall not conflict with any provision of a collective bargaining agreement* between such employer and a labor organization. . . .") (emphasis added); Ga. Code Ann. § 34-9-243 (providing for certain reductions in weekly benefits due to be paid by employers "*[e]xcept as otherwise provided* in this Code section or *in a collective bargaining agreement*. . . .") (emphasis added); Minn. Stat. § 176.82 (requiring employers to offer continued, alternative employment to work-injured employees and providing "*the provisions of any collective bargaining agreement shall govern*" in determining the availability of such employment) (emphasis added); *also* Ark. Stat. Ann. § 11-9-505(a)(2) (same); Fla. Stat. § 440.211, Ky. Rev. Stat. Ann. § 342.277, Minn. Stat. § 176.1812, 77 Pa. Cons. Stat. § 1000.6 (all permitting collectively bargained agreements to establish binding light-duty, modified-job, and/or return-to-work programs).

10. Bureau of National Affairs, Inc. ("BNA"), *Basic Patterns In Union Contracts* 79 (14th ed., 1995) (hereinafter, "*Basic Patterns*" or "the BNA survey"). There is no relevance here to the statistic cited by Shaw's that "only twenty-three percent (23%) of the contracts in the survey's data base contained hiring provisions." Opposition at 10, n.7. "Hiring provisions," as discussed in the BNA survey, do not refer to the mere mention of hiring within overearching managements rights provisions, as here, but to separate contractual provisions setting forth preferences for local, experienced, and/or union-furnished workers. *Basic Patterns* at 99. There is no such provision in the collective bargaining agreement here. *See* App. 17a-117a.

reaches, and effectively penalizes, the vast majority of employees within Massachusetts (and arguably, as discussed *supra*, beyond the Commonwealth) who have exercised rights to participate in collective bargaining, by denying them access to state-granted protections on matters concerning reemployment and non-retaliation after receiving workers' compensation benefits. *See Livadas*, 512 U.S. at 116, 114 S. Ct. at 2074 ("A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose").

Applying federal pre-emption to Massachusetts' balancing, in §§ 75A and 75B, of its protection of its work-injured citizens with those citizens' rights to collective bargaining, thus offends the policies that animate federal labor pre-emption, penalizes employees for their exercise of federal rights, and perpetuates the "disagreements" within the Courts of Appeals, concerning Section 301 pre-emption specifically, that this Court acknowledged in *Livadas*. *See Livadas*, 512 U.S. at 124, n.18; *see also* 512 U.S. at 130 (criticizing invocations of federal pre-emption that penalize unionized employees and that force parties "to bargain for what they would otherwise be entitled to as a matter of course"); *compare*, *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22 (1987) ("If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, [citation omitted], surely one that permits such bargaining cannot be pre-empted").

Because the decision of the First Circuit here conflicts with decisions of the Seventh Circuit Court of Appeals, among others, on the important matter of federal pre-emption; because it conflicts with this Court's articulation of the principles of federal labor law pre-emption of state-granted rights and the dangers of denying state protections to represented workers; and because the decision is far-reaching in its potential to oust states of jurisdiction to enforce protections granted to their citizens (and flood federal courts with removed cases brought under state workers' compensation laws), this Court should grant Martin's Petition for a Writ of *Certiorari* on this important matter of federal law.

CONCLUSION

For the reasons set forth above and in Martin's Petition, the Court should grant Martin's Petition for a Writ of *Certiorari* and summarily reverse the judgment of the First Circuit Court of Appeals, or, in the alternative, grant *Certiorari* and grant plenary review.

Respectfully submitted,

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